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No. 10-

IN THE

Supreme Court of the United States

MICHAEL H. BLAKENEY,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment Confrontation Clause permits the admission of grand jury testimony at trial, where at trial the witness has no recollection whatsoever about the facts underlying his grand jury testimony, the substance of his grand jury testimony. or even the act of giving his grand jury testimony.

2. Whether the Sixth Amendment Confrontation Clause is satisfied by an out-of-court declarant's presence at trial even if the declarant's total memory loss prevents him from providing any testimony at trial regarding his prior statement, as the court below and many other state and lower federal courts have interpreted *United States v. Owens*, 484 U.S. 554 (1988), or whether the Confrontation Clause requires that the declarant be able at trial to defend or explain his prior statement, as this Court held in *Crawford v. Washington*, 541 U.S. 36 (2004).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael H. Blakeney respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The memorandum opinion of the District of Columbia Court of Appeals on the initial decision is unreported, 1a–9a,[1] as is the order denying the petition for rehearing and/or rehearing *en banc*, 29a-30a. The relevant trial proceedings and orders in the District of Columbia Superior Court also are unpublished. 10a-28a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The judgment of the District of Columbia Court of Appeals was entered on December 14, 2009, and the order denying rehearing and *en banc* review was entered on May 14, 2010.

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1. Numbers followed by "a" refer to pages in the Appendix to this Petition. "App. ___" refers to the Appendix submitted by Blakeney to the D.C. Court of Appeals. Citations to the transcript of Blakeney's trial in D.C. Superior Court are noted as [date] Tr. [page].

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI.

INTRODUCTION

This case provides this Court with a critical opportunity to determine whether a witness' mere presence in the witness box secures a defendant's constitutional right to be confronted by witnesses against him. The D.C. Court of Appeals' decision, along with a line of other state and lower federal court decisions, endorses a "mere presence" theory of confrontation that permits the use of out-of-court testimonial statements the moment a witness sits down in the witness box – even if that witness serves no function at trial. Such an approach goes beyond this Court's jurisprudence and reduces the confrontation right to nothing more than an "empty procedure." *Crawford v. Washington*, 541 U.S. 36, 74 (2004) (Rehnquist, C.J., concurring in the judgment).

If the right to confrontation is to serve any purpose, the witness must be capable of answering questions concerning *some* element of his accusations against the defendant. To be sure, in *United States v. Owens*, 484 U.S. 554 (1988), this Court held that the Confrontation Clause is satisfied when a witness testifies, even if the witness is partly

forgetful. A witness who forgets the facts underlying his prior statement, but not the circumstances of giving that statement, for instance, does not create Sixth Amendment difficulties. *Id.* at 559.

Owens did not address a situation where a witness cannot recall *any* facts related to his prior statement, even the fact that he had made the statement at all. Nor did *Owens* imply that Sixth Amendment concerns are obviated by a witness' mere presence in the witness box. Other decisions of this Court make clear that this was not the intent of *Owens*. And *Owens* did not consider the potential for abuse inherent in a rule permitting the use at trial of grand jury testimony whenever the witness sits down in the witness box, even if the witness is unable or unwilling to provide any testimony in court.

State and lower courts addressing the issue, however, have interpreted *Owens* to mean that all Confrontation Clause concerns are eliminated as long as a witness is present at trial, even if the witness cannot remember any facts relevant to his out-of-court statement. This Court should correct this misinterpretation. The state and lower federal court's application of *Owens* goes beyond the bounds of that case and is in conflict with the Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004), that an out-of-court statement is admissible only if the witness is "present at trial *to defend or explain*" his prior testimony. *Id.* at 59 n.9 (emphasis added).

STATEMENT OF THE CASE

Petitioner Michael H. Blakeney was convicted in D.C. Superior Court of murder and related firearms charges for the 2005 shooting of Laurisa Ryland. His conviction turned primarily on out-of-court grand jury testimony by the government's sole alleged eyewitness, Terrence McNatt.[2] McNatt told a grand jury on January 11, 2005, that he thought he saw Blakeney fire two shots into a parked van. App. 34-37. In his grand jury testimony, however, McNatt could not identify Blakeney with certainty because McNatt never saw the shooter's face. *Id.* at 39. Rather, McNatt based his accusation on the shooter's clothing and posture. *Id.* Further, he observed the shooting from more than a block away, *id.* at 30-31, 203-04, too far to even hear the van's window glass shatter, *id.* at 50. Blakeney, of course, did not have any opportunity to cross-examine McNatt during grand jury proceedings.

At trial in April 2007, McNatt insisted that he could not remember anything about the shooting or his grand jury testimony. *Id.* at 56, 156, 201. Blaming a long-term drug habit, McNatt claimed

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2. The trial court acknowledged that the government had no case without McNatt's out-of-court testimony. 4/18/07 Tr. 427 (THE COURT: "If McNatt, somehow his grand jury testimony is excluded . . . the government's case goes away, right? The government can't make its case without McNatt."). The government admitted the case against Blakeney would be "severely weakened" if McNatt's grand jury testimony was excluded. *Id.*

that he was unable to provide testimony concerning a broad range of potentially relevant facts, including the night of the shooting, McNatt's questioning by police, and his grand jury testimony. Indeed, McNatt said that entire period of his life was beyond his recall.[3] Nevertheless, the trial judge made no formal finding regarding McNatt's memory loss. Instead, the judge allowed the government to "impeach" the witness' claimed memory loss through the admission of a recording of McNatt's entire grand jury testimony as a "prior inconsistent statement." 10a-28a.[4]

As a result of McNatt's total memory loss – or perhaps as a result of his unwillingness to testify, if his claims of memory loss are not credited – Blakeney's trial counsel never had the opportunity to cross-examine McNa tt before the jury about what happened on the night of the shooting, about his statement to police, or about the circumstances and details of his grand jury testimony. The jury thus had no opportunity to assess McNatt's credibility on these crucial topics.

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3. McNatt admitted during questioning from the trial judge that he could not recall "anything about what happened to [him] or about what was going on" during the years 2004 and 2005. App. 123-24.

4. In doing so, the trial court overruled Blakeney's objections on hearsay and Confrontation Clause grounds and rejected Blakeney's argument that *Crawford* changed the footing upon which *Owens* rests. 12a-13a.

Blakeney could not probe the facts underlying McNatt's prior testimony because McNatt could not recall anything about the night of the shooting. For instance, McNatt did not even remember being at the scene of the shooting. *Id.* at 120 (McNatt stating that he could not remember if he was "coming or going"); *id.* at 156. Critically, although his out-of-court identification of Blakeney to the grand jury rested almost entirely on his identification of the shooter's clothing, at trial, McNatt could not recall anything about the shooter, much less his clothing. *Id.* at 201. Consequently, at trial, Blakeney was unable to test through cross-examination the strength of the critical piece of testimony that linked Blakeney to the shooting.

Nor was McNatt able to recall making his prior statements against Blakeney. In fact, he never identified Blakeney as the shooter at trial. He did not remember discussing the shooting with police officers during the investigation of the crime. *Id.* at 156, 172-73, 179. More significantly, McNatt insisted, "I can't recall nothing that happened at the grand jury." *Id.* at 156. Thus, McNatt's total memory loss allowed him to avoid having to defend or explain his prior accusations in court and left Blakeney unable to confront any aspect of his primary accuser's testimony.

McNatt was not even able to remember the circumstances under which he made the prior accusation. He could not recall, for example, whether or not he had any personal motivation to

avoid incarceration when he gave his prior testimony against Blakeney. *Id.* at 177-81. He did not know if the police had provided him with information about the crime before he testified to the grand jury. *Id.* at 172-73. He could not even say whether or not he had testified truthfully in front of the grand jury. *Id.* at 174-75.

By the time McNatt left the witness box, he had stated that he did not remember more than fifty times in response to defense counsel's attempted cross-examination. *See, e.g.*, *id.* at 162-64, 174-75, 201-02. Although McNatt testified about general matters that may relate to credibility (such as his poor eyesight at the time of trial – although not at the time of the crime – and his history of drug abuse and crime), he was unable to provide a single answer relevant to his accusations against Blakeney – accusations that were, in the trial judge's view, the linchpin of Blakeney's conviction.

Blakeney was ultimately convicted of the three charges against him, and he appealed his convictions to the District of Columbia Court of Appeals. Bound by recent precedent of that court, *see Blunt v. United States*, 959 A.2d 721 (D.C. 2008), the court concluded in a *per curiam* opinion that a defendant's right to confrontation is satisfied if the witness takes the stand, even when total memory loss precludes the witness from providing any testimony at trial relevant to the accusation. 5a-6a. With respect to the substance of his accusation against Blakeney, McNatt was able to offer no more

than his presence at trial, yet the Court of Appeals found that the witness' mere presence was sufficient to meet the constitutional requirement for "confrontation." Thus, the Court of Appeals was "constrained to reject" Blakeney's Sixth Amendment argument. 8a.

The Petitioner timely filed a petition for a rehearing and rehearing *en banc*. The Court of Appeals directed the government to file a response, but the court denied the petition on May 14, 2010. 29a-30a.

REASONS FOR GRANTING THE PETITION

This case squarely presents this Court with an opportunity to correct the erroneous application of the Court's Confrontation Clause precedent by the court below and by other state and federal courts, and the resulting deprivation of defendants' Sixth Amendment rights.

Based on its interpretation of *United States v. Owens*, the D.C. Court of Appeals effectively exempted Terrence McNatt's grand jury testimony from the rigors of the adversarial process. In doing so, the D.C. Court of Appeals violated Blakeney's constitutional right to confront his accusers. The Court of Appeals, focused on *Owens*, paid no heed to this Court's teaching in *Crawford* that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S.

at 50. If *ex parte* grand jury testimony may be used at trial even where a witness can no longer recall any relevant facts regarding either the alleged crime or his prior testimony, that "principal evil" will be permitted to sneak in through the back door, unconfronted. This Court should take the opportunity that this case provides to prevent back door circumvention of the Sixth Amendment.

Nor did the Court of Appeals take into account *Crawford*'s holding that the Confrontation Clause requires that the witness be present at trial to "defend or explain" his out-of-court statement. McNatt's total memory loss precluded him from defending or explaining any point of his grand jury testimony, yet the Court of Appeals, relying on *Owens*, found his mere presence at trial sufficed for Confrontation Clause purposes.

Moreover, where, as here, a witness never has to repeat any part of his story at trial, the witness evades the moment of self-reflection inherent in confrontation. *See Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) ("A witness may feel quite differently when he has to *repeat his story* looking at the man whom he will harm greatly by distorting or mistaking the facts." (quotation marks omitted; emphasis added)). He avoids looking the defendant in the eye as he levels his accusations. And, perhaps more importantly, he avoids the truth test of cross-examination.

Unfortunately, the D.C. Court of Appeals' reading of *Owens* is not unique. Rather, state and lower federal courts have been reading *Owens* to allow use of a witness' out-of-court, testimonial statements as long as that witness takes the stand at trial, even where, as here, the witness has no memory of anything related to the extrajudicial statement. In such cases, the witness is effectively unavailable for Confrontation Clause purposes, and the extrajudicial statement is nothing more than an *ex parte* examination.

The Petition should be granted to correct this pervasive error in the application of the Confrontation Clause, and to eliminate the confusion among state and lower federal courts about the boundaries and implications of *Owens*, particularly given the serious issues their reading of *Owens* creates for the administration of the criminal justice system.

A. The D.C. Court Of Appeals' Decision (And Decisions Of Other State And Federal Courts) Conflicts With This Court's Precedents.

This Court has long regarded the Confrontation Clause as requiring more than mere presence. Although "face-to-face presence" is certainly an element of the confrontation right, *Coy*, 487 U.S. at 1019-20, "[c]onfrontation means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *see also Dowdell v. United States*, 221 U.S.

325, 330 (1911) (defendant is to be tried "by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination"). Indeed, this Court has observed that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination . . . , which cannot be had except by the direct and personal putting of questions *and obtaining immediate answers*." *Davis*, 415 U.S. at 315-16 (quotations marks, internal citations, and original emphasis omitted; emphasis added). This opportunity cannot be a sham; it must be an opportunity for "full and effective cross-examination." *California v. Green*, 399 U.S. 149, 159 (1970); *accord Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (requiring a "full and fair opportunity").

1. *Owens* does not hold that the Confrontation Clause is satisfied by a witness' presence at trial regardless of the extent of memory loss about his prior out-of-court statement.

Confrontation, including the opportunity for full and effective cross-examination, is not possible where the out-of-court statement of a witness is used but the witness cannot speak at trial to *any* aspect of that statement. In *California v. Green*, the Court specifically left open the issue whether a witness' "apparent lapse of memory" could "so affect[]" a defendant's "right to cross-examine as to make a

critical difference in the application of the Confrontation Clause." *Green*, 399 U.S. at 168. On several occasions, this Court has addressed the Confrontation Clause consequences of a witness (testifying at trial) who, due to memory loss, could not testify about *some aspects* of his prior out-of-court statement. *See, e.g.*, *Owens*, 484 U.S. 554; *Fensterer*, 474 U.S. 15. In each of these cases, however, the witness was able to testify about some element of his prior statement – either the underlying facts, the content of the prior statement, or the circumstances surrounding the giving of the prior statement. *See, e.g.*, *Owens*, 484 U.S. at 556 (witness recalled making past identification, but could not recall basis of identification); *Fensterer*, 474 U.S. at 16-17 (witness recalled present opinion, but could not recall basis for opinion).

The Court has not yet had occasion to answer the question left open in *Green*, *i.e.*, whether a witness' memory loss could ever so affect a defendant's right to cross-examine as to run afoul of the rights guaranteed by the Confrontation Clause. *See, e.g.*, *Fensterer*, 474 U.S. at 20 ("We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause."). Certainly, *Owens* does not answer the question whether the demands of the Confrontation Clause can be satisfied by the appearance at trial of a witness with *no* recollection

whatsoever of any fact relevant to his out-of-court statement.

In *Owens*, witness John Foster was attacked and beaten, and as a result suffered injuries that severely impaired his memory. 484 U.S. at 556. The defendant was accused of the attack on Foster. At trial, Foster testified about the attack and about a prior, out-of-court statement he made identifying the defendant as his attacker. *Id.* He no longer, however, actually recalled seeing his attacker, though he did "clearly remember[] identifying [defendant Owens] as his assailant." *Id.* The Court concluded that this limited degree of memory loss did not violate the Confrontation Clause, as the defendant still possessed other "weapons . . . to impugn the witness' statement." *Id.* at 560.

The Court in *Owens* echoed the view first expressed by Justice Harlan in his concurring opinion in *Green* "that a witness' inability to 'recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence.'" 484 U.S. at 558 (quoting *Green*, 399 U.S. at 188 (Harlan, J., concurring)). In light of the facts of *Owens* – where the witness was able to testify as to some important relevant facts, both about his prior testimony and the underlying crime – and in light of the Court's other precedents, we submit that the Court's statement should be read

disjunctively. *See, e.g.*, *id.* at 560 ("We do not think that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness' live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness' earlier statement to that effect."). Put differently, *Owens* establishes only the proposition that use at trial of an out-of-court statement does not run afoul of the Confrontation Clause when the witness at trial cannot recall *either* (1) the facts underlying the out-of-court statement; *or* (2) the substance of the out-of-court statement; *or* (3) the circumstances under which the out-of-court statement was given. *Owens* does not hold that the requirements of the Confrontation Clause can be satisfied when a witness forgets every aspect of *all three* elements.

When a witness is unable to provide *any* testimony relevant to his prior statement – a situation unlike any of the Court's previous cases – his simple presence at trial does not "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *Green*, 399 U.S. at 161. A defendant who wishes to attack a witness' statement that is now entirely forgotten is left in the untenable position of being forced to (1) attempt to obtain confirmation from the witness that the out-of-court statement was, indeed, the witness' statement and (2) refute the very information that the defendant was forced to elicit from the witness. *See, e.g.*, Richard D. Friedman, *Prior Statements of a Witness:*

A Nettlesome Corner of the Hearsay Thicket, 1995 Sup. Ct. Rev. 277, 300-301 (1995); *see also* Christopher B. Mueller, *Cross-Examination Earlier or Later: When is It Enough to Satisfy* Crawford*?*, 19 Regent U.L. Rev. 319, 335 (2007) ("'[F]ull and effective' cross-examination should mean that the witness has answered questions about both the acts, events, or conditions reported in the statement and about the statement itself."); Christopher B. Mueller & Laird C. Kirkpatrick, 4 *Federal Evidence* § 8:37 (3d ed. 2010 Supp.) ("Cross-examination is useless if a witness claims a total lack of memory, refuses to answer any questions, or denies even making prior statements or having knowledge of the acts, events, or conditions described in them.").

Here, Terrence McNatt was unable to provide any testimony about his prior grand jury testimony, and each and every question about his prior testimony was effectively unanswered. McNatt was unable to defend, explain, or even qualify his prior statement in any way. McNatt may have answered questions about matters arguably related to his general credibility, such as whether he sometimes lied when he was in school, whether he had ever been incarcerated, and what it felt like to use PCP. But he could offer nothing that actually spoke directly to his prior grand jury testimony or to the underlying facts of the crime he allegedly witnessed.

2. The court below and other lower courts have interpreted *Owens* to make the extent of memory loss irrelevant to Confrontation Clause analysis.

The court below was nevertheless unwilling to make any "distinction between total memory loss and partial memory loss," 6a, even though the functional consequences of "partial" and "total" memory loss are separated by leaps and bounds. Rather, it determined that such a distinction was foreclosed by its prior decision in *Blunt v. United States*, 959 A.2d 721 (D.C. 2008). *See* 6a. *Blunt*, however, assumed that, under *Owens*, "a genuine inability to remember does not make a witness 'unavailable' for purposes of confrontation" and looked only at the issue of feigned memory loss. *Blunt*, 959 A.2d at 727.

Other state courts and lower federal courts have similarly read *Owens* as foreclosing any analysis of a defendant's rights under the Confrontation Clause where a witness is unable to remember the events discussed in a prior extrajudicial statement, the making of the extrajudicial statement itself, and anything else relevant to the extrajudicial statement. In *Makell v. State*, 656 A.2d 348 (Md. Ct. Spec. App. 1995), for example, the Maryland Court of Special Appeals faced a fact situation quite similar to the one here – a witness who had testified before the grand jury but claimed at trial to have no memory of years of his life

because of drug use. *Id.* at 350. And, there, as here, the Maryland court determined that, despite the witness' "multi-year drug stupor," "[t]he *Owens* holding, adopting Justice Harlan's position in *California v. Green*, makes no distinction between a selective failure of memory and a total failure." *Id.* at 352, 358.

The decision below and *Makell* are only two examples of the numerous cases where state and lower federal courts have allowed a witness' out-of-court statement to be used at trial simply because the witness is present at trial even though the witness was wholly incapable of defending or explaining the prior statement due to memory loss. *See, e.g., Yanez v. Minnesota*, 562 F.3d 958, 960-61, 963-65 (8th Cir. 2009); *Felix v. Mayle*, 379 F.3d 612, 617-18 (9th Cir. 2004), *rev'd on other grounds, Mayle v. Felix*, 545 U.S. 644 (2005); *People v. Perez*, 98 Cal. Rptr. 2d 522, 524-26 (Cal. Ct. App. 2000); *A.E.B. v. State*, 818 So. 2d 534, 535-36 (Fla. 2002); *State v. Fields*, 201 P.3d 586, 596, 600 (Haw. 2005); *State v. Holliday*, 745 N.W.2d 556, 561, 566 (Minn. 2008); *State v. Jenkins*, 23 P.3d 201, 202-03, 205-06 (Mont. 2001); *State v. Legere*, 958 A.2d 969, 973-74, 977-80 (N.H. 2008); *State v. McManus*, 990 A.2d 1229, 1232-33, 1237-38 (R.I. 2010); *State v. Pietluck*, 742 N.W.2d 74 (tbl.), 2007 WL 3010550, at *1, *3-*4 (Wis. Ct. App. Oct. 17, 2007).

The court below and these other courts appear to mistake mere presence at trial for the actual right

to confront accusers. In so doing, however, these courts overlook this Court's rulings in cases like *Crawford*, where the Court indicated that presence alone cannot suffice for the purposes of the Confrontation Clause. *Crawford*, 541 U.S. at 59 n.9; *see also, e.g.*, *Davis*, 415 U.S. at 315; *Dowdell*, 221 U.S. at 330. In fact, in *Crawford*, the Court held that the out-of-court declarant must be present at trial "to defend or explain" his prior statement – which the witness obviously cannot do if he has no recollection about the underlying facts of the prior statement. *See also, e.g.*, *Green*, 399 U.S. at 157 (the witness should be present "to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact").

These courts have read too much into *Owens*. And they have overlooked the significance of this Court's other cases culminating in *Crawford*, which emphasize the importance to the Confrontation Clause of the witness' presence at trial to "defend or explain" his prior statement and of the defendant's fair opportunity to cross-examine the witness about the out-of-court statement. By so doing, the court below and these other courts have been committing constitutional error. *Cf. Crawford*, 541 U.S. at 53-54 ("[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, *and the defendant had had a prior opportunity for cross-examination*.") (emphasis added).

As noted above (at 13), the Court's opinion in *Owens* follows substantially from Justice Harlan's "scholarly concurrence" in *Green*. *See Owens*, 484 U.S. at 558. In that concurrence, Justice Harlan described the Confrontation Clause as granting only a limited right directed at "flagrant abuses, trials by anonymous accusers, and absentee witnesses." *Green*, 399 U.S. at 179 (Harlan, J., concurring). Justice Harlan deter mined that the Confrontation Clause was meant to "reach[] no farther than to require the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial" – essentially, a rule satisfied by mere presence at trial. *Id.* at 174; *see also Dutton v. Evans*, 400 U.S. 74, 93-99 (1970) (Harlan, J., concurring) (expressing view that Confrontation Clause was not intended to place limits on admissible evidence at all, but instead was only meant to define the procedure to be used at trial).[5] Under Justice Harlan's approach, the Confrontation Clause creates only an "attendance right," and thus, memory loss cannot pose a Confrontation Clause concern, no matter how severe. *See* David Greenwald, *The Forgetful Witness*, 60 U. Chi. L. Rev. 167, 174 (1993). It is not surprising, therefore,

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5. *Dutton* represents Justice's Harlan's full embrace – begun in *Green* – of Wigmore's view that "[t]he Constitution does not prescribe what kinds of testimonial statements . . . shall be given infra-judicially." 400 U.S. at 94 (quoting 5 J.Wigmore, *Evidence* § 1397, at 131 (3d ed. 1940)).

that a court reading the opinion in *Owens* – which adopts Justice Harlan's concurrence in *Green* – would conclude that total memory loss does not create an issue under the Confrontation Clause.[6]

The lower courts' focus on *Owens* in this context overlooks the significance of *Crawford*, in which this Court decisively *rejected* Justice Harlan's view of the Confrontation Clause, 541 U.S. at 50-51,[7] and recognized that the declarant's presence is not, in and of itself, enough. Rather, the witness must be present for a purpose – to "defend or explain" the prior statement. (Notably, *Crawford* does not cite *Owens* at any point in the opinion.) There must be an actual opportunity for cross-examination through obtaining the witness' answers to at least some questions, not an endless string of "I can't

6. Although state and lower courts have attempted to reconcile their interpretation of *Owens* with this Court's decision in *Crawford*, those courts have not specifically addressed the issue raised here of *Crawford's* rejection of the theoretical underpinnings of *Owens*. *See, e.g.*, *People v. Argomaniz Ramirez*, 162 P.3d 1015, 1017-18 (Colo. 2004); *Mercer v. United States*, 864 A.2d 110, 114 n.4 (D.C. 2004); *Fields*, 201 P.3d at 596; *Holliday*, 745 N.W.2d at 565-66; *Legere*, 958 A.2d at 977; *Pietluck*, 2007 WL 3010550, at *3-*4.

7. See also *Melendez Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527 (2009), in which the Court confirmed that concerns about convenience, a focal point in Justice Harlan's analyses, have no place in the Confrontation Clause context.

remember" responses. *See* Mueller & Kirkpatrick, *supra* (cross-examination not adequate simply where "the witness is present and can be required to sit still long enough for questions to be put"). Because the *Owens* opinion leads state and lower courts into constitutional error, the Petition should be granted to correct these errors and clarify the import of *Owens* in light of *Crawford*.

B. The Issue Presented Is Critical To The Proper Administration Of Federal And State Criminal Trials.

The issue presented is essential to the proper administration of criminal trials in this country. The case below illustrates the troubling consequences of allowing a witness' out-of-court testimonial statement – and particularly grand jury testimony – to be used when he cannot recall any relevant facts. *See* Mueller, *supra*, at 335 (describing practical consequences of a witness' inability to recall any relevant facts).

Because McNatt could not recall anything related to the underlying events or, in fact, the entire years of 2004 and 2005, cross-examination concerning circumstances surrounding his prior grand jury testimony was impossible. Thus, McNatt could not be cross-examined about any potential biases he held when he gave his prior testimony, whether he was lying in his prior statement, whether he was coerced, or whether he was under the influence of drugs or alcohol. He could not

describe his care and attentiveness at the scene of the crime, because he could not recall having been there.

Nor would an attack on McNatt's memory be useful to the defense, as McNatt's memory loss arose *after* he gave his grand jury testimony. Blakeney's counsel could not ask McNatt to explain ambiguities in his prior statement or provide additional details not mentioned in the grand jury testimony. Instead, Blakeney could, at best, attack tangentially related matters – such as prior drug use and prior incarceration – that left the substance of the prior statement unchallenged before the jury. "[I]n this situation cross-examination of the witness . . . is of scarcely more aid in testing the dependability of the alleged out-of-court statement than would be the cross-examination of A to test the verity of an alleged statement by B." Judson F. Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. Rev. 43, 53 (1954-55). But "*Crawford*'s language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial." David H. Kay et al., *The New Wigmore: A Treatise on Evidence – Expert Evidence* § 3.10.3, at 63 (Supp. 2010).

McNatt's inability to remember anything related to his prior, out-of-court statement also denied Blakeney his chance to achieve the central goal of cross-examination: total recantation of the prior statement. As the Michigan Supreme Court has explained:

> The would-be cross-examiner is not only denied the right to be the declarant's adversary, he is left with no choice but to become the witness' friend, protector and savior. Though he may be permitted to ask questions in the form of cross-examination, the substance of his effort will be redirect examination and rehabilitation. The reason is simple. The witness cannot recant! Every cross-examiner tries to bring the witness to the point where he changes his story—literally eats his words—in the presence of the jury.

Ruhala v. Roby, 150 N.W.2d 146, 156 (Mich. 1967).

This case is particularly troubling because it involves grand jury testimony. Allowing prior grand jury testimony to be used at trial where the witness cannot recall any relevant facts creates worrying incentives for prosecutors and witnesses alike. In such circumstances, prosecutors could procure testimony from witnesses in highly favorable, *ex parte* circumstances like the grand jury. At trial, the witness could then feign total memory loss or otherwise refuse to answer, knowing that his presence would be enough to admit his out-of-court statement. On the other hand, a witness who is aware that he will not be able to effortlessly avoid cross-examination may be more careful in providing honest and truthful testimony before the grand jury. Similarly, a prosecutor who knows an accuser will

face effective cross-examination may be more likely to carefully vet those accusations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 12, 2010

APPENDIX

APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE DISTRICT OF COLUMBIA COURT OF APPEALS FILED DECEMBER 14, 2009

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 07-CF-889

FEL325-05

MICHAEL H. BLAKENEY,

APPELLANT,

v.

UNITED STATES,

APPELLEE.

Appeal from the Superior Court
of the District of Columbia
Criminal Division

(Hon. Neal E. Kravitz, Trial Judge)

(Argued November 20, 2009
Decided December 14, 2009)

Before REID and FISHER, *Associate Judges*, and WAGNER, *Senior Judge*.

Appendix A

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: A jury convicted appellant, Michael H. Blakeney, of first-degree premeditated murder while armed,[1] possession of a firearm during a crime of violence ("PFCV"),[2] and carrying a pistol without a license ("CPWL").[3] He raises issues relating to the grand jury testimony of a government witness, the sufficiency of the evidence, and the prosecutor's rebuttal. We affirm the judgment of the trial court.

FACTUAL SUMMARY

The government presented evidence showing that Mr. Blakeney murdered Laurisa Ryland on January 6, 2005, while she sat in a vehicle near First and Q Streets, in the Northwest quadrant of the District of Columbia. On the day of the murder, Ms. Ryland spoke several times by phone with her friend of twenty years, Betty Caughman. During one of their calls, sometime between 8 p.m. and 10 p.m., Ms. Ryland stated that she was going to the hairdresser and that she planned to meet "Mike," whom she described as her boyfriend, at First and Q Streets. Upon her arrival at First and Q, Ms. Ryland talked with Ms. Caughman. Ms. Caughman heard Ms. Ryland say, "There go Mike right there."[4]

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1. D.C. Code §§ 22-2101, -4502 (2001).

2. D.C. Code § 22-4504 (b).

3. D.C. Code §22-4504 (a).

4. During her grand jury testimony, Ms. Caughman recalled Ms. Ryland saying, "There he go."

Appendix A

Around 8:30 p.m. on January 6, 2005, Carlos Lowe went to a pool hall in New Carollton, Maryland with Mr. Blakeney and Pedro Rich. Upon arrival there, Mr. Lowe lent appellant his cell phone, and he heard Mr. Blakeney, who was arguing with his girlfriend, exclaim, "Bi**h, you'll make me kill you." Mr. Blakeney was angry. The three men left the pool hall around 10:30 p.m. Mr. Lowe dropped Mr. Blakeney off at Florida and North Capitol Streets, and watched appellant walk in the direction of First and Q. As he left the car, Mr. Lowe heard Mr. Blakeney declare: "[T]his bi**h is going to make me kill her."

Mr. Rich's testimony confirmed that the three men went to the pool hall together. He stated that he lent Mr. Blakeney his cell phone "a couple of times," and that on the return trip appellant exited the vehicle on "North Capitol" near a gas station, at the intersection of Florida Avenue. However, he did not hear Mr. Blakeney make any comment about killing or threatening anyone.

Terrance McNatt testified before the grand jury. He lived in the area of First and Q and "hung out" there. He had known a man named "Mike" since August 2004. He saw him daily, including January 6, 2005. He spoke to Mike around 9 p.m. that day. He saw Mike later that night at First and Florida Avenue, and also noticed a lady in a van. In addition, at about 10:45 p.m., Mr. McNatt witnessed Mike jogging out of an alley with a gun; Mike ran to a van, shot twice and then ran to an alley. Before his grand jury appearance in this case, the police had shown Mr. McNatt a photo array and he had

selected Mr. Blakeney's photo as that of the person he saw firing the gun into the van. At trial, however, Mr. McNatt claimed that he did not "hang out" around Florida and North Capitol, and he claimed not to remember his grand jury testimony "too good" because he "smoked a lot of PCP." At the government's request, the jury heard an audiotape of Mr. McNatt's testimony.

Mr. Blakeney's aunt, Beverlee Blakeney, testified that sometime in January 2005, she heard appellant say he was dating a woman who "was a stalker" and he feared her husband might come after him and hurt him. On the night of the murder, Mr. Blakeney visited his aunt and said he thought the married woman "was shot dead"; that the married woman kept calling him; and that he had been at the pool hall that night. Mr. Blakeney wanted to watch the news "[b]ecause . . . I think my friend got killed. She might be on the news."

Metropolitan Police Department Detective Anthony Brigidini testified that he showed Mr. McNatt a photo array and Mr. McNatt chose Mr. Blakeney's photograph as that of the man he saw shooting into the van on January 6, 2005. Furthermore, Detective Brigidini indicated that when he met with Mr. McNatt about three weeks before trial, Mr. McNatt was "belligerent" and had stated that if called to testify, "he was going to say he was high on PCP." And, Bruce Levine, an expert in wireless phone technology, traced calls from Mr. Lowe's cell phone, which Mr. Blakeney had borrowed on the night of January 6. He located calls to Ms. Ryland's phone originating from cellular towers in New

Carrollton, Maryland (the site of the pool hall) and in the downtown area of the District at 7:04 p.m., 10:51 p.m., 10:52 p.m. and 26 seconds, and 10:52 p.m. and 59 seconds. The cellular tower sites revealed that the last calls were made within three blocks east and six blocks west of the crime scene.

ANALYSIS

Mr. Blakeney contends that the trial court violated his constitutional Sixth Amendment right under the Confrontation Clause by allowing the jury to hear Mr. McNatt's grand jury testimony even though he asserted at trial "a total memory loss" regarding both the incident on January 6, 2005, and his grand jury testimony. In *Blunt v. United States*, 959 A.2d 721 (D.C. 2008), we reiterated the fundamental principle that "the Sixth Amendment 'guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id.* at 728 (quoting *United States v. Owens*, 484 U.S. 554, 559 (1988)) (emphasis in original). Moreover, "'[w]hen the declarant *appears for cross-examination at trial*, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.'" *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004)) (emphasis in original). Significantly, "a witness' inability to recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or

recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence." *Id.* at 730 n.8 (quoting *United States v. Milton*, 303 U.S. App. D.C. 386, 394, 8 F.3d 39, 47 (1993)).

Mr. Blakeney's Confrontation Clause contention in this case is foreclosed by our decision in *Blunt*, which makes no distinction between total memory loss and partial memory loss, so long as the declarant (here Mr. McNatt) is available to the defense for cross-examination, as he was in this case.[5] Furthermore, what we repeated in *Mercer v. United States*, 864 A.2d 110 (D.C. 2004) is applicable here:

> It is sufficient that the defendant has the opportunity to bring out matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even what is often a prime [] objective of cross-examination, . . . the very fact that he has a bad memory. The ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination . . . [even] when the witness's past belief is introduced and he is

5. We are unconvinced by Mr. Blakeney's statutory argument indicating that he did not "testify" and was not "subject to cross-examination concerning the statement," within the meaning of D.C. Code § 14-102 (b). *See Bell v. United States*, 790 A.2d 523, 528 (D.C. 2002); *Sparks v. United States*, 755 A.2d 394, 399-400 (D.C. 2000).

> unable to recollect the reason for that past belief.

Id. at 114 n.4 (quoting *Owens, supra*, 484 U.S. at 564).[6]

During cross-examination of Mr. McNatt, counsel for Mr. Blakeney concentrated on the witness' failure to recall his grand jury appearance or anything on that day, as well as his inability to remember talking to the police before going to the grand jury. Defense counsel posed questions concerning the effect of Mr. McNatt's alleged addiction to PCP on his memory, even eliciting comments such as it "distorts your mind," and it makes you feel "[h]igh . . . like walking in the sky." Defense counsel also stressed Mr. McNatt's reputation for not telling the truth in the past when he attended the Sunrise School. In addition, counsel endeavored to cast substantial doubt on Mr. McNatt's grand jury testimony in this case by asking, "It's certainly possible that what you told the grand jury was a lie, correct?" Mr. McNatt responded, "Yeah . . . I don't know -- I don't remember what I told --." Hence, defense counsel's extensive cross-examination, if Mr. McNatt's responses were believed by reasonable jurors, had the potential effect of casting doubt on his eyewitness grand jury testimony against Mr. Blakeney. Under the circumstances of this case, and in light of *Blunt*, *Owens*, and *Mercer*, *supra*, we are

6. Mr. Blakeney's reliance on *Douglas v. Alabama*, 380 U.S. 415 (1965) is misplaced since, unlike the case before us, the witness there could not be cross-examined because he invoked his Fifth Amendment privilege against self-incrimination.

constrained to reject Mr. Blakeney's Sixth Amendment Confrontation Clause argument.[7]

Our review of the record in this case satisfies us that Mr. Blakeney cannot prevail on his insufficiency of the evidence argument. Contrary to his effort to depict Mr. McNatt as the only reliable government evidence against him, Ms. Caughman, Mr. Lowe, Mr. Rich, Mr. Blakeney's aunt, Detective Brigidini, and Mr. Levine provided strong and probative circumstantial evidence regarding motive and identity. Moreover, reasonable jurors were free to believe and credit Mr. McNatt's grand jury testimony and to disbelieve his trial testimony concerning his alleged total loss of memory.[8]

7. Mr. Blakeney and amicus, the National Association of Criminal Defense Lawyers ("NACDL"), argue for the first time in this case that the trial court should have threatened Mr. McNatt with contempt before admitting his grand jury testimony into evidence. We review this argument under our plain error standard, and we conclude that Mr. Blakeney cannot satisfy the fourth prong of that standard, that is, he cannot demonstrate that any error in failing to threaten to hold Mr. McNatt in contempt would "seriously affect[] the fairness, integrity or public reputation of [Mr. Blakeney's] judicial proceedings." *See Thomas v. United States*, 914 A.2d 1, 22-23 (D.C. 2006); *United States v. Olano*, 507 U.S. 725, 732 (1993). In addition, we are unpersuaded by the other plain error arguments advanced by Mr. Blakeney, including his assertion that the trial court ignored Mr. McNatt's Fifth Amendment privilege.

8. Mr. McNatt's initial trial testimony was that he could not remember his grand jury testimony "too good," not that he had a total loss of memory regarding that testimony.

Appendix A

Given the government's evidence and viewing it in the light most favorable to the government and recognizing the province of the jury to make credibility determinations and factual findings, as we must, we are unable to say that "the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt." *Zanders v. United States*, 678 A.2d 555, 563 (D.C. 1996); *Blakeney v. United States*, 653 A.2d 365, 369 n.3 (D.C. 1995).

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court."

So ordered
ENTERED BY DIRECTION OF THE COURT:

s/ Garland Pinkston, Jr.
GARLAND PINKSTON, JR.
Clerk of the Court

9. As his third argument, Mr. Blakeney claims that the trial court erred by allowing the government to comment on Mr. McNatt's "memory loss" during its rebuttal argument by saying, "That young man remembered everything." This claim is subject to plain error analysis, and Mr. Blakeney has not met his burden under the fourth prong of that standard. *See Thomas, Olano, supra*, note 5.

APPENDIX B — EXCERPTS OF TRANSCRIPT DATED APRIL 19, 2007

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION – FELONY BRANCH

Criminal No. 2005-CF1 325

Volume 3 of 4

Washington, D.C.

Thursday, April 19, 2007

UNITED STATES OF AMERICA,

v.

MICHAEL BLAKENEY,

Defendant

The above-entitled action came on for a trial before the Honorable NEAL E. KRAVITZ, Associate Judge, and a jury duly empaneled and sworn, in Courtroom Number 302, commencing at approximately 10:20 a.m.

[commencing at page 493]

* * *

THE COURT: Well, let me just -- I know the defense wants to make further argument, but let me just say what my impression of all this is, having now heard from [494] Mr. McNatt and having read the cases that were cited in the defendant's pleading and that were cited by government counsel yesterday.

I -- I think that the Supreme Court's decision in Owens versus United States -- or United States versus Owens, 484 U.S. 554, the decision from 1988, is probably the single most important decision here and is strongly supportive of the government's position.

Now, it's always dangerous to rely too heavily on what a dissenting justice, in complaining about the majority's ruling, says about it because sometimes, as we all know, those dissents tend to overstate what the dissenting justice thinks is the -- is going to be the result of this misguided decision by the majority of the justices.

But if you read Justice Brennan's dissent, which I think in many ways is a more clear articulation of the holding than maybe is readily apparent from Justice Scalia's majority opinion, it becomes more clear that what the Supreme Court held in that case, United States versus Owens, is that even if -- and notwithstanding what it may have said previously in the Green case that the defense relied on quite heavily in its pleading, California versus Green from 1970 -- that what the Sixth Amendment guarantees is having a live witness there, subject to [495] cross-examination, someone who can answer your questions, and even if it's not effective

cross-examination within the meaning -- or successful cross-examination within the notion -- consistent with the notions that a defense lawyer might have of those terms -- it's cross-examination and confrontation within the meaning of the Sixth Amendment.

And one of the things that I was interested in when I was reading the defendant's pleading in this case was the suggestion that Owens might very well be decided differently today given the Supreme Court's recent interest in Sixth Amendment and confrontation clause jurisprudence, beginning with the Crawford decision, and that -- it was interesting to the defense, at least, that the same author, Justice Scalia, in writing Crawford, didn't even cite to the Owens decision.

And all of that is of some academic and intellectual interest. The problem, I think, with the defendant's position or suggestion that, somehow, Owens ought to be disregarded in light of Crawford is that our Court of Appeals specifically addressed that question in this case Mercer versus United States, 864 A.2d 110. In footnote 4, they say, Subsequent to oral argument in this case, the Supreme Court decided Crawford versus Washington -- they give a cite -- and we requested supplemental briefing from both parties. In Crawford, the [496] Supreme Court affirmed the principle that when a declarant appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of his prior testimonial statements.

And then this is the most important part: We are satisfied that the requirements of Crawford were met here. Nothing in that opinion suggests that the court -- meaning the Supreme Court -- intended to limit its holding in Owens, and we are bound to follow Supreme Court precedent unless it is expressly limited or abandoned.

And then our Court of Appeals goes on to say -- still in footnote 4 -- in Owens, a witness who had given a prior identification of an individual was not able to recall making that prior identification, when called at trial, due to memory loss. The defendant argued that the memory loss suffered by the declarant precluded him from being cross-examined. The Supreme Court held that those circumstances, which are essentially what occurred here -- meaning in the Mercer case -- do not present confrontation clause problems.

And I -- while no two cases are identical -- they never are -- Mercer is -- and I'm sure the defense can distinguish it because any good lawyer can distinguish anything. But it is, in my view, analytically, incredibly similar to the case -- to the facts and circumstances that [497] are before us.

And I don't think -- to go back to Owens and the Supreme Court's treatment of the confrontation clause issue in the context of a witness who says he doesn't remember anything -- the defense is not going to have any difficulty with Mr. McNatt, showing that there are a lot of reasons why the jury should not credit or rely on

Appendix B

Mr. McNatt's grand jury testimony, from his drug use to his bias based on his own concerns about his own liberty status to his prior convictions that will impeach his credibility -- and to his bad memory, which is really what Justice Scalia talks about in Owens.

Ultimately, the jury will be able to see for itself -- and it will all kind of play out in front of the jury -- that the witness has a terrible memory, for whatever reason -- I mean, whether it's a brain injury because of the assault, as it was, in Owens, or whether it's drug use, PCP use, as it is in our case -- you don't even need an expert to tell the jury that PCP use can have a devastating effect on a witness' ability to perceive or remember things. The witness is going to tell you that himself.

And he's going to tell you, presumably -- it sounds to me like he's going to testify that he was messed up on PCP at the time of his grand jury testimony, which is [498] another avenue of potentially devastating cross-examination. I mean, obviously the jury -- it's going to be up to the jury to determine what parts of his testimony here in trial and at the grand jury are credible. But there's certainly not going to be any dearth of opportunity to impeach Mr. McNatt as a witness and, thereby to cross-examine him within the meaning of the Sixth Amendment, even though it appears that he's going to maintain his position that he does not remember any of the details of this -- well, either of his grand jury testimony or of his -- whatever observations he may have made on the night of January 6th, 2005.

It is clear to me that within -- and as Mercer makes clear -- the Mercer decision, 864 A.2d 110 -- that Mr. McNatt's grand jury testimony is inconsistent within the meaning of D.C. code section 14-102, which is trial testimony -- if, as we expect, his trial testimony is going to be that he doesn't remember what happened on the night of the murder.

And -- you know, so as a matter of evidence law, under D.C. code section 14-102 -- is it (b)(1)? Let me just check and make sure.

MS. BELL: I think it is.

THE COURT: Yes. It's 14-102(b)(1), which would define Mr. McNatt's grand jury testimony as not hearsay [499] because the declarant will be testifying at the trial and will be subject to cross-examination.

And I think one of the things that the Court of Appeals makes clear in Mercer is that subject to cross-examination means the same thing in the context of D.C. code section 14-102(b) as it means in the context of the confrontation clause.

And -- he will be subject to cross-examination concerning the statement and the statement is inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial hearing or other proceeding.

Now, I think that -- and then to go back to the case that the government has cited previously, this Antwonne (phonetic) McConnaughey versus United States --that's M-c-C-o-n-n-a-u-g-h-e-y, D.C. Court of Appeals 2002. Now, we have -- I forgot to ask -- I just realized I forgot to ask Mr. McNatt whether he could read the transcript of the grand jury testimony, and this reminded me of it because in this case, McConnaughey, if I'm remembering correctly, the witness could not read, because of a learning disability, and he refused to listen to the tape of his grand jury testimony, in part because the government didn't have the technological ability to queue up the tape of the grand jury testimony kind of on a [500] question-by-question basis.

Judge Richter said that, under these unusual circumstances, the whole tape can just be played, except for certain portions that must be redacted because of evidentiary reasons or prejudice reasons. And the Court of Appeals said that was not an abuse of discretion, given the circumstances.

Now, here, we have a witness who has listened to the tape, and he says it still doesn't refresh his memory. And he said the other day that looking at the transcript of his grand jury testimony doesn't refresh his memory.

MS. BELL: See, but the government's perspective, I think, as in McConnaughey, I mean, I think the critical issue is he's saying that he doesn't remember because he was high on PCP. And listening to the tape, I think it's clear -- and I think it's very helpful and instructive -

- the jury is going to be able to determine, does someone who spoke with the clarity and the recall that he did at the time of his grand jury -- and that is evident from this tape -- is that consistent with someone who is high on PCP? And that's why we think --

THE COURT: Well, that's another -- I obviously haven't heard the tape, but that's another potential similarity with the McConnaughey decision because, there, the witness testified that he had been tricked into giving [501] his testimony in the grand jury, and Judge Richter thought that playing the whole tape was -- would give the jury a better opportunity to evaluate the witness' statement that he had been tricked in -- into giving the testimony that he gave in the grand jury.

MS. BELL: And I think what's important, Your Honor, is particularly given the fact that, you know, he not only has the ability to, in the grand jury -- the testimony demonstrates not only his ability to recall and to have a sense of direction and, really, detailed facts -- he's able to make moral judgments, moral decisions. I mean, it shows someone who is operating at a very -- if not a high, at least a very cogent, lucid level of clarity.

And that's key, because that is clearly inconsistent with what we presume he's going to say is, I don't remember anything because I was high on PCP. I mean, this tape is diametrically opposed to that state of mind.

MS. BUCKINGHAM: Your Honor, we disagree. We don't think that the tape is necessary under the

circumstances of this case. We don't think it rebuts his assertion that he was high on PCP. They never ask him if he was high on PCP. We know that a lock-up test from two days prior -- one day prior showed that he was, in fact, under some sort of influence of PCP. It was in his system. And he's told us that he was smoking PCP daily.

[502] So we don't think, under these circumstances, that the tape -- that playing the tape is necessary. I'd also like to address --

THE COURT: Hold on one second.

MS. BELL: If I could just briefly --

THE COURT: No, no. Hold on. It seems to me --the witness is going to testify that -- he is going to testify that he was high on PCP and totally out of it at the time of his grand jury testimony.

If the government takes the position that the tape-recording of the witness' voice in the grand jury is inconsistent with that testimony, it would seem to me that absent some other reason why playing the tape -- well, it would seem to me that allowing the jury to hear the witness' voice is clearly relevant. In other words, to put it more accurately, the witness' tone of voice on the actual tape is clearly relevant to the government's legitimate interest in rebutting the testimony that he was totally out of it on PCP at the time of his testimony.

Now, if there's some reason why playing that for the jury is so wildly prejudicial over and above the Sixth Amendment issues, which I feel like I've already resolved, then maybe there would be a reason for excluding the tape as an evidentiary matter.

But I don't see what that would be. I mean, I [503] think that there are parts of the tape that will need to be redacted -- and I actually marked a couple --

MS. BELL: And that's --

THE COURT: -- while I was reading the transcript last night, and there may be others that you all can agree on. But I don't -- I didn't think there was much, quite frankly, in the transcript that offended me in terms of its substance. I can tell you what I came up with. I think there were two spots. I found on page 6, lines 10 through 14 where there's a reference to the defendant being incarcerated.

MS. BELL: Clearly, that would come out.

THE COURT: That had to come out. And then there was one other place where I think there was hearsay.

MS. BELL: About him going to Florida?

THE COURT: Yes.

MS. BELL: Yes. I mean --

THE COURT: Yes. The statements of, like, Jip or --

MS. BELL: Right.

THE COURT: On page 24, lines 12 through 24 --

MS. BELL: Right.

THE COURT: -- I thought were clearly hearsay.

MS. BELL: Right. That --

THE COURT: And there may be other things that [504] the parties can agree on or, if they can't agree, would need to be raised.

My biggest concern in terms of the playing of the tape is I'm not -- maybe Mr. McNatt's testimony that that is his voice on the tape is sufficient. I mean, it sounds to me he remembers -- well, maybe -- I was going to say he remembers that he testified in the grand jury, although -- I mean, he gives -- you know, he gives inconsistent testimony about that. He says, I don't remember being there, but I remember when I was there I was stoned out of my mind on PCP. So who knows.

It may be that if there's not going to be a stipulation that the tape is inaccurate --

MS. BELL: There is going to be a stipulation that it's accurate.

THE COURT: What I was going to say is that if there's not a stipulation that the tape or the transcript are accurate memorializations of the questions and answers in the grand jury, that we might have to hear from a court reporter or from Judge Anderson to lay the proper foundation.

MS. BELL: We have agreed that -- we would have a stipulation because -- I actually have the court reporter on call, and they wanted a stipulation as to Ms. Caughman. It's the same court reporter. So we are going to stipulate [505] that it's authentic.

MS. BUCKINGHAM: Your Honor, I think we'd like to return to the issue, first, of whether or not this is prejudicial to us, playing the tape.

We think that it would cause the jury to speculate. As Your Honor said before, there have been witnesses who have testified in court who had PCP in their system or had been on PCP before, and they were cogent in court and the jury could listen to them.

So I don't think that the -- that playing the tape is going to change that.

The jury would need an expert to testify about how to explain the fact that he's speaking and responding to questions even though he may be high on PCP, and

how that's possible. And it would cause the jury to speculate, and we think that that's improper and that it's prejudicial to Mr. Blakeney.

There are some additional points within the transcript where we have some issues, but I also want to make sure that we have a chance at least to put our position on the regard with regard to Mr. McNatt testifying at all. And Mr. McNatt, it is our position, is not going to be subject to cross-examination under the meaning of 14-102(b)(1), or under the meaning of the confrontation clause.

[506] And even if he is physically present here and takes the stand, it is our position he's not going to be subject to cross-examination.

Your Honor mentioned Mercer, and I'd like to address how Mercer is analytically different than the situation that we have here.

In Mercer the witness had testified at a previous trial where she was subject to cross-examination, and she had testified before that trial at the grand jury.

When it comes time for the second trial, there had been some intervening head trauma and strokes that caused her memory to lapse. She was able to be impeached as to her memory at the second trial, with her admission from the first trial, where she was subject to cross-examination, that she did testify in front of the grand jury because at that time she remembered testifying in front of the grand jury.

Appendix B

THE COURT: Well, I think that's -- as I understand the procedural posture of that case, the testimony -- the, quote, prior recorded testimony from the first trial, at which there was cross-examination, came in to lay the proper foundation for the admissibility of the grand jury testimony. But I didn't understand the Mercer decision to be that she really even remembered that -- at the first trial, she said she remembered testifying in the [507] grand jury.

My understanding was that that snippet of, quote, prior recorded testimony, end quote -- which is another exception or another kind of category of non-hearsay evidence -- came in to lay the foundation.

So it was a pretty non-substantive part of her testimony. I mean, I think that's kind of apparent.

MS. BUCKINGHAM: What is critical in Mercer is that the defense counsel, who had previously cross-examined this witness at the first trial, had the opportunity to use that transcript from the first trial in cross-examining her when she was on the stand at the second trial.

There was an opportunity in Mercer for the defendant to cross-examine the witness. The witness had previously been subject to cross-examination, and that could be used, and those statements from the previous trial could be brought out at the second trial.

THE COURT: Ms. Bell, I don't -- I mean, I've read these cases. I'm not going to state an opinion as to whether I think Owens and Mercer were correctly decided, because it's not my proper role. My obligation is to follow them, and I think that -- I just think that the government is correct, that under these circumstances, the case law is very clear.

And as I said, no two cases will have exactly the [508] same facts, but I think it's very difficult to try to draw an analytical -- meaningful analytical distinction between the Mercer situation and our situation.

And as I said, I think that strong arguments can be made -- and all you've got to do is read Justice Brennan's dissent in the Owens decision to see how powerful some of these arguments can be made concerning what perhaps ought to be viewed as the insufficiency of the confrontation right under the Owens doctrine, such as it is.

But, again, that is not for a judge of the Superior Court of the District of Columbia to revisit. It's just not my call.

MS. BUCKINGHAM: Your Honor, while I understand that, there are a few other points that I'd like to make, at least for our record.

THE COURT: All right.

MS. BUCKINGHAM: And that is that in this case, Terrence McNatt is the sole eyewitness, and he is the sole -- provides the sole direct piece of evidence in this case with his testimony that he was an eyewitness to the shooting, and pointing the finger at Mr. Blakeney. And that is analogous to the situation in Douglas versus State of Alabama -- and that is 380 U.S. 415. And in --

THE COURT: All of that is clear, and I think [509] what it means is that if I've committed constitutional error, it will not be deemed harmless beyond a reasonable doubt.

I mean, I just don't think that, as a matter of analysis, that it makes any difference. We're talking here about the Sixth Amendment and evidence law, and for the reasons I've stated, I've ruled the way I've ruled. I feel bound to rule the way I've ruled.

But I think it -- your point is a good one. This is not -- we're not in harmless error territory if I'm wrong.

MS. BUCKINGHAM: And, Your Honor, it's further our contention that this witness is unreliable and that he is incompetent to testify. We have a situation here where the government has had constructive notice that he was a PCP user. The government knew he came to them as a witness after he had been arrested. They knew he came through CIO and was subject to a lock-up test. The fact that they failed to get that lock-up test, failed to ask him during their interview if he was using PCP at the time, failed to ask him, when he's in the grand

jury, whether or not he's using PCP means that they have a failure in protecting this line of cross-examination and in protecting the integrity of this witness.

They could have done something at a previous [510] point where had a deposition where he was available to Mr. Blakeney to be cross-examined, and they didn't do that because they closed their eyes to evidence that they had, that they constructively were aware of, that they just didn't seek out. And we think that's significant, Your Honor.

THE COURT: Well, you know, I haven't heard the tape of the grand jury testimony, but I'm not -- I mean, I've read the transcript, and I've read every word of the transcript, and there's certainly nothing in the transcript that suggests to me that this witness was bordering on incompetence at the time that he testified in the grand jury, January 11th, 2005.

And so I'm not sure that it's a -- I mean, part of what you say is clearly true. The government at least had access to information -- whether it had it or not I don't know, but it had access to information that Mr. McNatt was a PCP user at the time that he first spoke to the police and prosecutors and then testified in the grand jury.

But there's nothing in the grand jury -- in the transcript of the grand jury testimony, at least -- that indicates to me that the government should have been on notice that this witness was on the verge of becoming

incompetent. And, quite frankly, I don't think he's [511] incompetent, within the meaning of that term of art.

I just questioned him for several minutes on the record, at close range. I don't think he has any difficulty understanding what I'm asking him and being able to respond in a comprehensible way.

He clearly knows that he's under oath. Whether he's testifying honestly, truthfully or not, I wouldn't venture a guess. But he clearly understands he's under oath. He made reference to it several times in his testimony.

MS. BUCKINGHAM: Your Honor, I have one other point.

THE COURT: Okay.

MS. BUCKINGHAM: Sorry to --

THE COURT: Please try to be as brief as you can.

MS. BUCKINGHAM: I will. I will. Your Honor had said that -- you had stated some of the reasons that we thought we were going to be -- that you thought we would be able to cross-examine Mr. McNatt, and I just wanted to highlight, under Owens and the factors that Owens went through, that we would have particular difficulty cross-examining Mr. McNatt, and it's our position he wouldn't be subject to cross-examination as to his lack of care of attentiveness because he has no specific recollection of that evening.

[512] We don't know if he's dealing drugs at the time and not paying good attention. And as to --

THE COURT: Well, first of all, I disagree with that as a factual matter because he's going to tell you that if he was there, he was high on PCP. I have no doubt he's going to tell you that. Because he's essentially -- and if he doesn't, you'll impeach him with his prior sworn testimony that he was stoned on PCP -- that's my word, not his -- but he was high on PCP that entire time period. And so I just don't think you're -- I don't think that's accurate.

It's going to be abundantly clear to the jury that at least -- that at least from his perspective he was high on PCP at the time of this murder.

MS. BUCKINGHAM: That's all. Thank you.

THE COURT: All right.

* * * *

APPENDIX C — ORDER OF THE DISTRICT OF COLUMBIA COURT OF APPEALS FILED MAY 14, 2010

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 07-CF-889

FEL325-05

MICHAEL H. BLAKENEY,

Appellant,

v.

UNITED STATES,

Appellee.

BEFORE: Washington, Chief Judge; Ruiz, *Reid, Glickman, Kramer, *Fisher, Blackburne-Rigsby, Thompson, and Oberly, Associate Judges; *Wagner, Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, and the opposition thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge

of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM